



Atty Gen. Op. No. 11 IIB02

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March 16, 2011

Amy Roe
19 Sunset Road
Newark, DE 19711

**RE: Freedom of Information Act Complaint
Against City of Newark**

Dear Ms. Roe:

By letter of November 19, 2010 to the Attorney General, you made a complaint pursuant to the Freedom of Information Act, 29 *Del. C.* ch. 100 ("FOIA"), against the City of Newark. You alleged that FOIA was violated 1) when the Mayor of Newark made an appointment to the Newark Housing Authority in July, 2010, without conducting a public meeting or obtaining a vote of the City Council, 2) when the Mayor "conferred" with all members of council either in person or by email to discuss his choice for the appointment, 3) when you were denied copies of those emails, and 4) when a focus group met without notice to the public.¹ You further ask whether the City violated FOIA in denying you copies of emails between the Mayor and members of Council that were sent and received on private computers through non-City email

¹ You also ask whether the Mayor violated the City Charter in appointing a member to the Newark Housing Authority without confirmation by the Council, and whether that appointment is "valid." FOIA does not reach those issues, and therefore we will not address them here.

accounts. Because FOIA only is concerned with records that involve public business, we will assume, for the purpose of providing this opinion, that the emails you want access to are not private emails, but only those in which public business is discussed. 29 Del. C. § 10002(g).

RELEVANT FACTS

In July, 2010, the Mayor of Newark made an appointment to the Newark Housing Authority, without the approval of the Newark City Council. There were no emails or conversations by which the Mayor discussed the appointment with Council members, either as a group or in serial fashion, before he made the appointment. He did send the Council members a memorandum notifying them that he had made the appointment, and you have been provided a copy of that document.

According to the City's response to your complaint, the Newark City Council authorized an outside contractor to prepare a report on electric rate issues. The City Finance Director, a City employee, gathered a group of "stakeholders," to meet informally to "provide input to City staff on what changes, if any, should be made in the City's electric rate structure."² The sole involvement of the City Council was to approve hiring the outside contractor.

According to the City, neither the City Council members nor the Mayor uses the City's computers for email correspondence. Any email correspondence between the Mayor and the Council members is done on private computers, through commercial email accounts.

² By "stakeholders," we assume the City means individuals who represent a constituency with a "stake"—some articulable interest—in the issues.

RELEVANT STATUTES

The purpose of the Delaware Freedom of Information Act is to provide “citizens . . . the opportunity to observe the performance of public officials and to monitor the decisions that are made by such officials in formulating and executing public policy; and further, it is vital that citizens have easy access to public records in order that the society remain free and democratic.”³ 29 *Del. C.* § 10001. To accomplish those purposes, meetings of a quorum of a public body must be open to the public (although closed, executive sessions are permissible for certain reasons), 29 *Del. C.* § 10004(a), and “[a]ll public records shall be open to inspection and copying[.]” 29 *Del. C.* § 10003(a).

A “public body” is “any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State, including, but not limited to any board, bureau, commission, department agency, committee, ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, [or] council” that is established by the General Assembly or “by any body established by the General Assembly . . . or appointed by any . . . public official of the State” **and** that is supported by or expends public funds, or is charged with advising, or making reports or recommendations. 29 *Del. C.* § 10002(c). However, the open meetings requirements do not apply to a public body consisting of only one member. 29 *Del. C.* § 10004(h)(6).

A “public record” is “information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public

³ While FOIA refers throughout to “citizens,” restricting the rights created by FOIA to only citizens of Delaware has been held unconstitutional. *Lee v. Minner*, 458 F.3d 194 (2006). Therefore, we will use the term “public” rather than “citizens.”

body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced,” 29 Del. C. § 10002(g), except that there are 19 kinds of records that “shall not be deemed public[.]” 29 Del. C. § 10002(g)(1)-(19).

DISCUSSION

First, you complain that you were not provided the emails in which the Mayor and the Council discussed the appointment of a member of the Newark Housing Authority; as there are no such emails, the City did not violate FOIA by not providing non-existent emails to you. *Op. Att’y Gen. 99-IB12*, 1999 WL 1095340 (Del. A.G.). Second, as to your complaint that the Mayor made the appointment without having a public meeting, even if we assume the Mayor is a public body, he would be a public body of one, and therefore the provisions of FOIA requiring public meetings do not apply to actions he takes alone. 29 Del. C. § 10004(h)(6). Therefore, the Mayor did not violate FOIA in acting alone to appoint a member of the Newark Housing Authority. Third, as to whether the City should have held the stakeholder meetings, or focus groups, in public, there is no evidence that the City created the stakeholder groups. On the contrary, the City states that the meetings were called by a City employee. A meeting between a public servant and members of the public is not a meeting of a public body, even if the public servant has selected who to meet with. Therefore, FOIA did not require public notice or public attendance at such meetings.

The final question is whether emails between public officials that concern public business are “public records” if they were never in the possession of the public body

because they were sent from and to private computers on private email accounts. This is a question of first impression.⁴ Clearly, the emails between the Mayor and the council members are not in the actual physical possession of the City. Moreover, the City has no right or recourse to compel elected officials to produce emails from their private computers.⁵ See, *Op. Att'y Gen. 00-IB03*, 2000 WL 1092972 (Del. A.G.)(school district not required to attempt to obtain records from its employees when the records were sent directly to the employees from a third party). As the emails you have requested are not in the City's actual or constructive possession,⁶ the emails are not public records of the City.

CONCLUSION

The City of Newark did not violate the Freedom of Information Act when: 1) the Mayor appointed a member to the Newark Housing Authority; 2) the City responded that

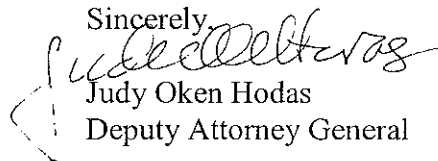
⁴ Other jurisdictions have been able to avoid the question where the public body conceded that private emails concerning public business were public records, *State ex rel. Glasgow v. Jones*, 894 N.E.2d 686, 691 (Ohio 2008); where the public body voluntarily searched a private email account for records responsive to a FOIA request, e.g., *Brophy v. United States Dep't of Defense*, 2006 WL 571901, *8 (D.D.C.); and where the public body never challenged the request on the grounds that emails on a private account were not public records. *O'Neill v. City of Shoreline*, 240 P.3d 1149, 1155 n. 4 (Wash. 2010) (ordering city to inspect deputy mayor's home computer's hard drive for deleted email, while acknowledging the order assumed the city would have access to the home computer).

⁵ Under the federal Freedom of Information Act, 5 U.S.C. §552, a document is a public record if the agency "create[d] or obtain[ed]" and possesses the record. *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-145 (1989) (quoting *Forsham v. Harris*, 445 U.S. 169, 182 (1980)). The federal courts do not require an agency to sue to obtain records it does not possess. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 139 (1980).


⁶ Constructive possession occurs when one has "[c]ontrol or dominion over a property without actual possession or custody of it." *Black's Law Dictionary*, 9th ed. (2009).

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the emails you requested did not exist; 3) a City employee met with a group of citizens;
4) the City did not provide you with the Mayor and Council members' emails that reside
on private computers.

Sincerely,

Judy Oken Hodas
Deputy Attorney General

Approved:


Lawrence W. Lewis, State Solicitor

cc: Opinion Coordinator
Bruce C. Herron, Acting City Solicitor